RECORD AND BRIEFS

No. 16-712

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In The

Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC,

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

AMICUS CURIAE BRIEF OF SECURITY PEOPLE, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

I. IPR Violates Separation Of Powers By Unconstitutional Impingement On Power Reserved To The Judiciary By Article III 4

II. IPR Results In Deprivation Of The Right To A Jury Trial 5

III. The Article III Violation Unfairly Empowers Infringers By Applying Different Burdens Of Proof, Presumptions, And Standards Of Patent Interpretation Used In IPR Trials 6

ARGUMENT 7

I. Patentees Are Entitled To Rely On Long-Standing Supreme Court Precedent That Has Always Treated Patents As Property And Hence Patent Invalidation As Subject Solely To The Judicial Power Under Article III 7

II. Adjudications Of Validity Involves Seventh Amendment-Protected Private Rights, Thus, The Right To A Jury Trial Is A Fundamental Part Of The Article III Fact-Finding Process 13

TABLE OF CONTENTS – Continued

Page

III. In The Name Of Efficiency, IPR Unfairly Tilts The Scales In Favor Of Infringers By Applying Different Burdens Of Proof, Presumptions, And Standards Of Patent Interpretation In Contradiction Of The Constitutional Mandate To Promote Inventions 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293 (2015) 9, 10

Crowell v. Benson, 285 U.S. 22 (1932) 16

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 4, 17

Hawes v. Gage, 11 F. Cas. 867 (C.C.N.D.N.Y. 1871) 12

Horne v. Dep't of Agriculture, 576 U.S. ___ (2015) 8

In re Lockwood, 50 F.3d 966 (Fed. Cir. 1995) 14

In re Mankin, 823 F.2d 1296 (9th Cir. 1987) 12

In re Tech. Licensing Corp., 423 F.3d 1286 (Fed. Cir. 2005) 5, 14

James v. Campbell, 104 U.S. 356 (1882) 8

Joy Techs., Inc. v. Manbeck, 959 F.2d 226 (Fed. Cir. 1992) 8, 15, 16, 17

Marbury v. Madison, 5 U.S. 137 (1803) 7

Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) 5, 14

McCormick Harvesting Co. v. Aultman, 169 U.S. 606 (1898) 4, 7, 8, 9, 15

MCM Portfolio v. Hewlett-Packard Co., 2015 U.S. App. LEXIS 20848 4

MedImmune, Inc. v. Genentech, Inc., 535 F. Supp. 2d 1020 (C.D. Cal. 2008) 14

TABLE OF AUTHORITIES – Continued

Page

Michigan Land & Lumber Co. v. Rust, 168 U.S. 589 (1897) 9

Microsoft Corp. v. i4i Ltd. Partnership, 131 S. Ct. 2238 (2011) 6

Moore v. Robbins, 96 U.S. 530 (1877) 9

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 459 U.S. 50 (1982) 12

Patlex Corp., Inc. v. Mossinghoff, 585 F. Supp. 713 (E.D. Pa. 1983) 10

Patlex Corp., Inc. v. Mossinghoff, 758 F.2d 594 (Fed. Cir. 1985) 7, 14, 15, 17

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 12

Stern v. Marshall, 131 S. Ct. 2594 (2011) 9, 19

Swofford v. B & W, Inc., 336 F.2d 406 (5th Cir. 1964) 17

Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831 (2015) 11

U.S. CONSTITUTION

Article I, § 8, cl. 8 ..... 10, 18

STATUTES, REGULATIONS, AND RULES

35 U.S.C. § 282 6

35 U.S.C. § 311(a) 15

35 U.S.C. § 316(c) 6

TABLE OF AUTHORITIES – Continued

Page

37 C.F.R. § 41.101 15

37 C.F.R. § 42.2 15

Fed. R. Civ. P. 26(a)(1) 16

OTHER AUTHORITIES

Daily, James E. and Kieff, F. Scott, *Benefits of Patent Jury Trials for Commercializing Innovation*, 21 Geo. Mason L. Rev. 865 (2014) 12

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Mossoff, Adam, *Who Cares What Thomas Jefferson Thought about Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 Cornell L. Rev. 953 (2007) 11

Rothwell, Michael, *After MCM, A Second Look: Article I Invalidation Of Issued Patents For Intellectual Property Still Likely Unconstitutional After* Stern v. Marshall, 18 N.C. J.L. & TECH. 1 (2017) 8

INTEREST OF *AMICUS CURIAE*[1]

Amicus Security People, Inc. ("SPI") is a closely held California corporation, which holds over thirty patents, the bulk of which it has actively practiced in products that it manufactures, markets, and sells. SPI has a petition for a writ of certiorari currently pending before this Court (*Security People, Inc. v. Matal, et al.*, 17-214) that raises the identical question posed by the instant petition.

SPI is currently involved in litigation in the Northern District of California regarding infringement on one of its patents (*Security People, Inc. v. Ojmar US, LLC*, case number 3:14-cv-04968-HSG). SPI had timely requested a jury trial. The defendant Ojmar answered and filed a counterclaim seeking invalidity of the subject patent and requested a jury trial. SPI moved to dismiss the counterclaim. Before the hearing on the motion to dismiss, Ojmar filed a petition for *inter partes* review ("IPR"). Ojmar also sought a stay of the District Court action pending the IPR. The District Judge stayed the action, pending resolution of the IPR. The stay of that action is currently still in place over two years later and has thwarted SPI's Article III litigation. Also, due to the stay, the scheduled jury trial

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to this filing and the consents are on file with the Court. Pursuant to this Court's Rule 37.6, *amicus* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief 's preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission.

that had been originally set for October 2016 was derailed. At issue in that case is SPI Patent No. 6,655,180 issued on December 2, 2003, which patent claims SPI incorporated in its products starting in 2002. SPI has actively practiced the patent at all times since, having invested millions of dollars into the patent, product development and its business built around the patent.

SPI is a classic small business success story, which has invested in patent development in good faith reliance that its property interest in its issued patents would be protected by the United States Judicial System. In sum and substance, SPI has been deprived of its rights to hearings, trial, and the standards of proof applicable in Article III courts. Due to the stay of its Article III judicial rights, SPI brought a lawsuit against the United States Trademark and Patent Office challenging the constitutionality of the *America Invents Act*, which is the subject of SPI's pending petition for certiorari, #17-214.

Amicus has long-standing and vested interests in various patents, and the preservation of the property rights secured thereby. *Amicus* is very concerned with the complete chaos and clouding of title of patent rights due to the *inter partes* review process under the America Invents Act. Specifically, *amicus* is very concerned about patent owners being stripped of their rights to have their patents adjudicated in Article III courts (with the attendant Seventh Amendment right to a jury trial) instead of at the hands of the Patent Office. The *inter partes* review process, as constituted, has an absolutely destabilizing effect on long-term

patent innovations and development, and the remuneration for such efforts. And, as such, is profoundly detrimental to the well-being and purpose of fostering patents as envisioned by the U.S. Constitution.

As noted above, *amicus* has a significant interest in the outcome of this case which tests the constitutionality of the *inter partes* review as currently constituted by the *America Invents Act*. *Inter partes* review applies and directly affects each and every patent and the considerable time, effort, and energy inventors have invested in said patents. IPR subverts patentees' reasonable expectations that their patent, once issued, would be protected as long-established under United States Supreme Court precedent as a vested property right which could not be taken without Article III determination in the circumstances where entitled, a right to a jury trial. *Amicus* strongly urges this Court to grant review to reject the constitutionality of the IPR as constituted under the *America Invents Act* which disregards fundamental long-established cardinal principles and underpinnings of the American constitutional system, the tri-partite system of government, to wit: the separation of powers, the rights and responsibilities of the judiciary under Article III, the right to property secured by the Fifth Amendment of the U.S. Constitution, and the right to a jury trial secured by the Seventh Amendment of the U.S. Constitution.

SUMMARY OF ARGUMENT

I. IPR Violates Separation Of Powers By Unconstitutional Impingement On Power Reserved To The Judiciary By Article III

This case warrants this Court's review. For the first time, in *MCM Portfolio v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015), a circuit court labeled a long recognized private property right (patents) as a public right. It did so to justify Executive Branch power (bestowed by the Legislative Branch) that boldly removes a type of traditional 1789-era adjudication from the control of Article III courts. These private property rights now go for final adjudication before Executive Branch employees. As noted in *McCormick Harvesting Co. v. Aultman*, 169 U.S. 606 (1898), once a patent is issued, it can only be cancelled or invalidated by an Article III court, not the Executive Branch. Similarly, as taught in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), Congress cannot conjure away the Seventh Amendment fact-finding process employed in Article III courts by mandating that traditional legal claims be tried to an administrative tribunal:

> "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency. . . ."

Id. at 61. The effect of the IPR process is that Article III courts now routinely stay the court proceedings pending the conclusion of the IPR process with its

resulting res judicata effect. It is self-evident that each day that the stay of an Article III infringement action is in place, the plaintiff in such an action is being deprived of its right to proceed before an Article III court as guaranteed by the U.S. Constitution, to wit: the judicial power as reserved to this Court to determine actual cases and controversies involving law and equity arising under the Constitution.

II. IPR Results In Deprivation Of The Right To A Jury Trial

Attached to and inseparable from Article III adjudication is the Seventh Amendment right to a jury trial: "[p]atent validity was a common-law action tried to a jury in Eighteenth Century England. An action to repeal and cancel a patent was pled as the common law writ of scire facias." *In re Tech. Licensing Corp.*, 423 F.3d 1286, 1292-1293 (Fed. Cir. 2005) (Newman, J., dissenting). See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996): "there is no dispute that infringement cases today must be tried to a jury." Thus, the IPR process is an unconstitutional and improper deprivation of patentees' established right to a jury trial in an Article III court. The right to a jury trial is not contingent upon any administrative process; it is an absolute fundamental constitutional right in the context of patent litigation.

III. The Article III Violation Unfairly Empowers Infringers By Applying Different Burdens Of Proof, Presumptions, And Standards Of Patent Interpretation Used In IPR Trials

Part of this case's importance is that this Court may now correct needless destabilizing of the innovation economy. Though adjudicatory, *inter partes* review trials depart from adjudication standards that have been developed over centuries in Article III courts. For example, when invalidity is raised in a declaratory judgment action or as a defense in an Article III court, the patentee enjoys a presumption of validity that must be overcome by the accused infringer or declaratory judgment plaintiff by clear and convincing evidence. See 35 U.S.C. § 282 ("A patent shall be presumed valid. Each claim of a patent . . . shall be presumed valid independently of the validity of other claims. . . . The burden of establishing invalidity . . . shall rest on the party asserting such invalidity. . . ."); *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238, 2242 (2011) (reaffirming clear and convincing standard). By contrast, the petitioner in an *inter partes* review trial must only prove invalidity by a preponderance of the evidence. See 35 U.S.C. § 316(e). It is the height of capriciousness that the validity of a patent depends on whether it is challenged in an IPR or in District Court. The effect of the IPR process is to violate the constitutional imperative to promote inventions.

ARGUMENT

I. Patentees Are Entitled To Rely On Long-Standing Supreme Court Precedent That Has Always Treated Patents As Property And Hence Patent Invalidation As Subject Solely To The Judicial Power Under Article III

Patents have played and continue to play a huge role in the economic and social development of the United States and the world. Imagine a world without American inventors Alexander Bell, Thomas Edison, and Steve Jobs. Based upon long-established law, patentees have every right to expect that those patents will be protected in Article III courts. The IPR process completely undermines this expectation, which in turn subverts the purpose of the Constitution's patent clause with its express intent to foster inventions. This constitutional objective is greatly diminished if patentees cannot be secure in their patent rights. It is difficult to exploit a patent, and build a product and/or business premised on a patent when it is subject to invalidation in a non-judicial setting.

In *Marbury v. Madison*, 5 U.S. 137, 154-156 (1803), it was held that whether a property right may be revoked lies within the exclusive province of the courts. Hence, a patent, upon issuance, is not subject to revocation or cancellation by any executive agent (i.e., the USPTO or any part of it, such as the PTAB). *McCormick*, 169 U.S. at 609. While *ex parte* reexamination has so far been held to avoid a Separation of Powers bar, see *Patlex Corp., Inc. v. Mossinghoff*, 758 F.2d 594

(Fed. Cir. 1985), that decision rested on classification of the *grant* of a patent right in the reexamination context as a "public" right. See *Joy Techs., Inc. v. Manbeck*, 959 F.2d 226 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 829 (1992) (confirming that it is the "grant" or "issuance" of a patent that is a public right, not the revocation or invalidation of previously granted private property). The Patent Office itself correctly believed, before the *America Invents Act*, that *McCormick* imposed a constitutional bar against commenting on the validity of an issued patent. R.W. Fieseler, *Staying Litigation Pending Reexamination of Patents*, 14 Loy. Univ. Chi. L. Rev. 279, 283 (1983), citing *United States v. General Elec. Co.*, 183 U.S.P.Q. (BNA) 551, 552 (Comm'r Pat. 1974). The MCM Court asserted that *McCormick* was not premised on constitutional grounds. This erroneous contention is thoroughly rebutted in Michael Rothwell's *After MCM, A Second Look: Article I Invalidation Of Issued Patents For Intellectual Property Still Likely Unconstitutional After* Stern v. Marshall, *18 N.C. J.L. & TECH. 1, 6 (2017)*, where he establishes unequivocally the constitutional roots and bases of *McCormick*.

In fact, as emphatically reiterated by this Court, patent rights are and were considered by United States courts to be constitutional private property subject to a takings analysis. *Horne v. Dep't of Agriculture*, 576 U.S. ___, slip op. at 6 (2015) (citing *James v. Campbell*, 104 U.S. 356, 358 (1882)); see also *James*, 104 U.S. at 358 ("[W]hen [the Government] grants a patent the grantee is entitled to it as a matter of right, and does

not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.").

Given that a patent is property, the only authority competent to set a patent aside, or to annul it, is vested in the courts of the United States, and not in the department which issued the patent. *Moore v. Robbins*, 96 U.S. 530, 533 (1877); *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589, 593 (1897). And in this respect a patent for an invention stands in the same position and is subject to the same limitations as a patent for a grant of lands. *McCormick*, 169 U.S. at 609.

Supreme Court activity confirms the need to hold *inter partes* review unconstitutional. In *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1316-1317 (2015), Justices Thomas and Scalia *sua sponte* raised the issue of the constitutionality of giving preclusive effect to agency decisions involving private rights so as to effectively deprive the party of a right to a trial in an Article III court and to a jury. See Justice Thomas dissenting, at 1316:

> Because federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights. Under our Constitution, the "judicial power" belongs to Article III courts and cannot be shared with the Legislature or the Executive. *Stern v. Marshall*, 564 U.S. __, __-__ (2011) (slip op., at 16-17); see also *Perez*, ante, at 8-11 (opinion of THOMAS, J.). And some historical evidence suggests that the adjudication of core private

> rights is a function that can be performed only by Article III courts, at least absent the consent of the parties to adjudication in another forum.

Although the majority in *B&B Hardware* did not address the constitutional issue because it was not raised below (Majority Opinion, p. 1304), the Court noted the availability of Article III *de novo* review. *Id.* at 1306. In the case of *inter partes* review, no district court *de novo* trial right exists. The district court in *Patlex Corp., Inc. v. Mossinghoff*, 585 F. Supp. 713, 725 (E.D. Pa. 1983), upheld the constitutionality of *ex parte* reexamination in part because its results, at the time, were subject to a *de novo* district court trial.

In defending the *America Invents Act*, the USPTO has suggested that Justice Thomas's recent dissenting opinions indicate that issued patents are public rights, citing *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1316, 1317 (2015) (Thomas, J., dissenting). Justice Thomas noted in *B&B Hardware* "that trademark infringement suits might implicate private rights on the fact that the 'exclusive right to use a trademark *was not created by an act of Congress*' but rather 'existed long anterior to [the Lanham Act].'" (*B&B Hardware*, 135 S. Ct. at 1317 (Thomas, J., dissenting)). The same is true of patents. See Constitution, Article I, § 8, cl. 8 ("To promote the progress of science and useful arts, by securing for limited times to authors and inventors *the exclusive right* to their respective writings and discoveries[.]") (emphasis added).

Both patents *and* trademarks rest on rights that existed "anterior" to the statutes that govern them – the U.S. Constitution's Intellectual Property Clause in the case of patents, plus hundreds of years of English court practice before then. At the very least, the right to adjudication of invalidity rested on such antecedents. Presumably, Justice Thomas' reasoning would be the same in this case.

Indeed, Justice Thomas' dissenting opinion in *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831 (2015) is informative. His use of the term "public rights" referred to the administrative act of *granting a land patent.* He described as a public right the pool of real property within the government's ownership before disbursement (in part) as a land patent. *Teva*, 135 S. Ct. at 848, n.2 (Thomas, J., dissenting) ("Land patents . . . dispose of public rights. . . ."). His "public rights" terminology did not refer to post-issuance land patents, and certainly not invention patents in any respect. *Id.*

If anything, pre-disbursement land patents are recognizably public whereas pre-patented inventions are categorically private. The original inchoate ideas whose legal rights eventually are reduced to patent belong to private inventors as the fruits of their intellectual labor. See Adam Mossoff, *Who Cares What Thomas Jefferson Thought about Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 Cornell L. Rev. 953, 992 (2007) ("*Jefferson*") ("In this way . . . a patent secured for an inventor the right to 'enjoy the fruits of his invention' because 'it is his property.'") (quoting

Hawes v. Gage, 11 F. Cas. 867, 867 (C.C.N.D.N.Y. 1871)).

This Court has explained the harm to the rule of law that arises whenever persons other than Article III judges wield the judicial power. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 50, 73-74 (1982). Lifetime tenure and the prohibition against salary reduction insulate Article III judges from political influence. See *id.* at 64; *In re Mankin*, 823 F.2d 1296, 1309 (9th Cir. 1987) ("The purpose of the lifetime tenure/no salary diminution requirement of Article III is in part to ensure that federal judges are independent of political pressure from the other branches of government."). Senate confirmation guarantees the most thorough vetting possible, and ensures that only independent jurists preside over cases. *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) ("[T]he design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the Federal Judiciary.").

These protections do not exist for administrative personnel who work within the hierarchy of the Executive Branch, and serve at the whim of agency heads, the President, or even Congress. Agency capture – to which federal courts are structured to be immune – has also crept into PTAB outcomes,[2] indeed resulting

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[2] James E. Daily and F. Scott Kieff, *Benefits of Patent Jury Trials for Commercializing Innovation*, 21 Geo. Mason L. Rev. 865, 878-879 (2014) ("One reason for this is that larger firms generally

in the reputation as "patent death squads."[3] In addition, the Judiciary has always supervised and adjudicated any deprivation of private property rights by the government. Only the Judiciary has historically been imbued with the power to adjudicate condemnation proceedings for takings (real property), seizure of criminal proceeds (personal property), nullification of land grants (land patents), and (until recently) invalidation of issued patents (intangible property). Placing such judicial power in the hands of personnel who work for the Executive offends the Constitution's reservation of such power to the Judicial Branch. The IPR process also exercises core judiciary powers such as interpretation of law and claim construction – areas that should belong exclusively to the Judicial Branch.

II. Adjudications Of Validity Involves Seventh Amendment-Protected Private Rights, Thus, The Right To A Jury Trial Is A Fundamental Part Of The Article III Fact-Finding Process

As noted, IPR trials adjudicate patent validity, including factual issues that otherwise would be tried to a jury in district court. They therefore violate the Article III fact-finding process under the inextricably

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are thought to be more effective at bringing political influence to bear in agency determinations.").

[3] Both the erstwhile Chief Judge of the Court of Appeals for the Federal Circuit and the Chief Patent Judge of the Patent Trial and Appeal Board have publicly agreed that "patent death squad" is an accurate label. Ryan Davis, *PTAB's "Death Squad" Label Not Totally Off-Base, Chief Says*, Law360 (August 14, 2014).

intertwined Seventh Amendment because they deprive patentees of jury trials. Patent infringement suits have a long history in the common law, and thus of a jury trial right. See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996) ("Equally familiar is the descent of today's patent infringement action from the infringement actions tried at law in the eighteenth century, and there is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago.") (citation omitted); *In re Lockwood*, 50 F.3d 966, 976 (Fed. Cir. 1995), *vacated*, 515 U.S. 1182 (1995)[4] (holding jury trial right applies to adjudication of patent validity, discussing eighteenth and nineteenth century patent adjudication in England and the United States); *In re Tech. Licensing Corp.*, 423 F.3d 1286, 1289 (Fed. Cir. 2005) (citing *Lockwood* for the proposition that under both English and American practice it was the patentee who decided whether a jury trial on the factual questions relating to validity would be compelled).

The Federal Circuit in *Patlex* excused *ex parte* patent reexaminations in the USPTO from the jury trial right only because "the *grant* of a valid patent is primarily a public concern." *Patlex*, 758 F.2d at 604 (emphasis added). Note that the public "right" was the public's "interest" in ensuring that the patent was

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[4] "After a grant of certiorari was mooted, *Lockwood* was vacated by the Supreme Court without explanation. However, the Federal Circuit repeatedly confirmed the vitality of *Lockwood*'s reasoning in subsequent cases." *MedImmune, Inc. v. Genentech, Inc.*, 535 F. Supp. 2d 1020, 1027 (C.D. Cal. 2008) (citations omitted).

properly *granted*. *Id.* The court held that because reexamination is directed to "correct errors made by the government, to remedy defective governmental (not private) action, and if need be to remove patents that should never have been granted," *id.*, re-doing the *examination process* qualified as a public right. The Court in *Joy* repeated this rationale. *Joy*, 959 F.2d at 228. Even assuming this legal fiction may survive scrutiny under *McCormick*, and above cited precedents, it simply does not apply here, because the IPR process is purely adjudicatory; an adversary trial between private parties, the patentee and the "petitioner,"[5] where the USPTO is the judge.

Inter partes reviews lack the very thing that allowed *ex parte* reexamination to pass muster: a legal fiction that the USPTO is restarting the examination process by patent examiners to correct a governmental mistake. The USPTO conducts a court-like trial between adversaries including taking of and weighing testimony of witnesses. In sum, it acts as an Article III court, but without a jury to weigh the multitude of factual issues presented and without the protections enjoyed by Article III courts (e.g., life tenure, protection

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[5] The PTO cannot initiate an IPR. Under 35 U.S.C. § 311(a), only a "person who is not the patent owner" may file a petition for IPR, and the PTO is not a "person" under the statute. Under 37 C.F.R. § 41.101, the "person who is not the patent owner" is referred to as the "petitioner," which is defined in 37 C.F.R. § 42.2 as "the party filing a petition requesting that a trial be instituted." The regulations define "party" as "at least the petitioner and the patent owner" and do not make any reference to the PTO. 37 C.F.R. § 42.2.

against salary reduction and involvement of the political process, and Senate confirmation in appointments). The USPTO is not a party, but serves as judge. For example, the trial includes initial scheduling orders, mandatory notices, initial disclosures modeled after Fed. R. Civ. P. 26(a)(1), depositions, additional discovery as the USPTO determines is otherwise necessary "in the interest of justice," cross-examination, compelled testimony and document production, oral argument, as well as objections, motions *in limine*, motions to exclude arguably inadmissible evidence, and oral argument. After the parties have finished the entire adversarial process, the USPTO's Judicial Panel issues a decision, which may cancel the patent.

In sum, *inter partes* review is virtually identical to what would happen if the party challenging the validity of the patents chose to bring an action in an Article III court instead with one key difference – no right to a jury trial. The Federal Circuit in *Joy* (in dispensing with a right to a jury trial) stated that a private right involves the liability of one individual to another, which contrasts with cases that "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Joy*, 959 F.2d at 229 (internal quotation marks omitted) (citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). *Inter partes* review is the epitome of a private dispute, and was designed by Congress to lack the features of reexamination which made reexamination a proceeding just between the Government and a person. In an

IPR trial, the USPTO assumes that the adversaries (the petitioner and patentee) will bring the best prior art and does not conduct any examination as part of the proceedings. Its decision is based entirely on the adversaries' arguments and evidence. This stands in stark contrast to *ex parte* reexaminations, which were the only USPTO proceedings considered in *Patlex* and *Joy*.

This is also why patentees' jury trial rights are being abridged in a way not present in Patlex or Joy. The Seventh Amendment protects the right to a jury trial on issues of patent validity that may arise in a suit for patent infringement. *Patlex*, 758 F.2d at 603 (citing *Swofford v. B & W, Inc.*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965)). "Congress may devise *novel* causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989) (emphasis added). Stated another way, the public rights exception cannot apply where a right has a long line of common-law jury-trial forebears. *Id.* at 52. "The Constitution nowhere grants Congress such puissant authority." *Id.* Instead, the claim must "originate in a newly fashioned regulatory scheme." *Id.*

Thus, not only does *inter partes* review violate Separation of Powers principles, it also violates the patentees' inseparably intertwined right to a jury trial under the Seventh Amendment.

III. In The Name Of Efficiency, IPR Unfairly Tilts The Scales In Favor Of Infringers By Applying Different Burdens Of Proof, Presumptions, And Standards Of Patent Interpretation In Contradiction Of The Constitutional Mandate To Promote Inventions

Patentees wrongly face significant lessened protections in the IPR process in the rules concerning burden of proof and claim interpretation, in contravention to long-established procedures in Article III courts. The undeniable effect of the different rules applied in the USPTO *inter partes* review is to put a patentee at a distinct disadvantage and greatly increase the odds that patents will be invalidated. The validity or invalidity cannot rationally depend on whether the matter is heard in U.S. District Court or in the Patent Office; however, due to different standards of proofs, presumptions and rule of patent construction, such unfair, unequal application of the law and unfair results are pre-ordained. This is in direct contradiction with the constitutional mandate Article I, Section 8 "to promote" inventions. IPR has created an expensive disincentive to invent. It has created a new form of forum shopping, whereby an infringer can opt out of Article III courts and seek protection in the Executive Branch.

Congress enacted the IPR process for the ostensible efficiency of trying issues of validity before a panel of administrative judges instead of Article III courts. Even if IPR were actually more "efficient," "[i]t goes without saying that the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) (quotation marks omitted). "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Id.* at 2620.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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